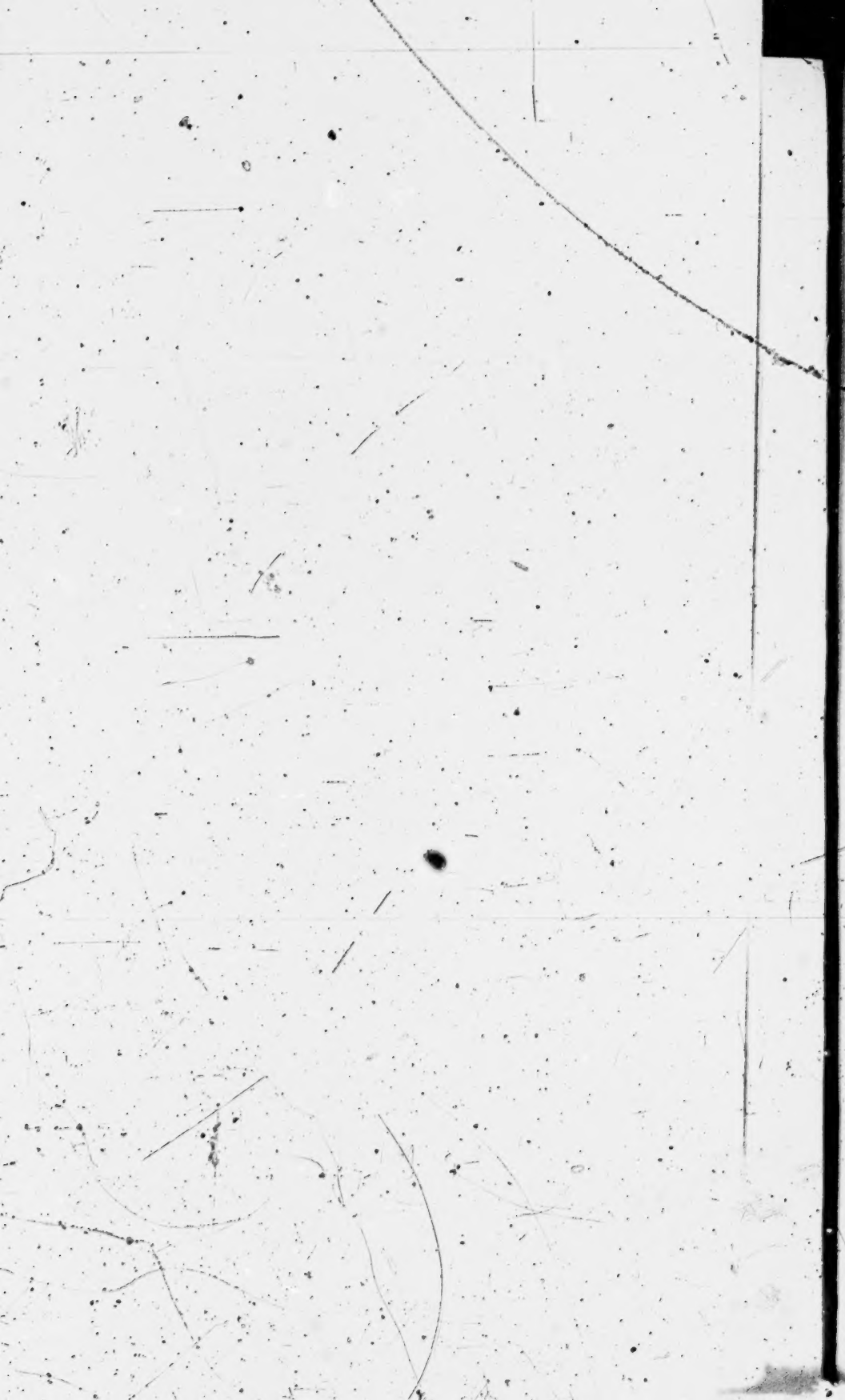

IN THE

Supreme Court of the United States

OCTOBER TERM, 1942

No. 79

WILLIAM A. ADAMS, Warden of the City Prison of Manhattan, and JAMES E. MULCAHY, United States Marshal,

Petitioners,

v.

THE UNITED STATES OF AMERICA, *ex rel.* GENE McCANN,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE RESPONDENT

ROBERT G. PAGE,
Attorney for Respondent.

EDWARD D. WYNOT,
of Counsel.

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BRIEF FOR THE RESPONDENT

Opinions Below

The opinion of the court below (R. 8-11) and the dissenting opinion of Judge Chase (R. 12) are reported in 126 F. (2d) 774, 776.

Jurisdiction

The order of the Circuit Court of Appeals was entered on March 31, 1942 (R. 13). The petition for certiorari, filed on April 23, 1942, was granted on April 27, 1942.

The jurisdiction of this Court is found in Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925.

Statement of the Case

The respondent was indicted on February 18, 1941 by a Grand Jury sitting in the Southern District of New York, the indictment charging, in six counts, violation of Section 215 of the Criminal Code (U. S. Code, Title 18, Sec. 338) (R. 2). He was tried by a judge without a jury, and without the assistance of counsel (R. 2). He was convicted on July 22, 1941, and sentenced to imprisonment for six years and to pay a fine of $600 (R. 2).

The respondent thereupon appealed to the court below, the trial judge fixing the bail at $10,000 (R. 8). Although the court below reduced the bail to $1,500 (Government's Brief, Appendix B) in March, 1942, the respondent remained in custody from the time of this conviction until after the entry of the order here challenged (R. 8 and Government's Brief, Appendix C). Respondent was without funds with which to pay the stenographer for typing the minutes of the trial (R. 8), which lasted about two and one-half weeks (R. 5). Without such minutes, as the court below found, respondent had been unable to prepare any bill of exceptions, it was unlikely that any could be made up, and any bill so settled would "be an unsatisfactory record of what took place at the trial" (R. 8).

Although in custody, and without funds and without counsel, and unable to prepare a bill of exceptions, respondent attempted, in various motions before the court below, to establish the injustice of his conviction and to make it possible successfully to prosecute his appeal. Thus he obtained from the court below the right to prosecute his appeal in *forma pauperis* (Government's

Brief, Appendix C, p. 62); he obtained from the court below various orders from time to time extending his time to file a bill of exceptions (R. 8); and he made various other applications, not shown by the record or referred to in the Government's Brief, for orders directing those having custody of respondent to permit the use of facilities needed to perfect the appeal, an order directing the Government to make a copy of the minutes of the trial available to respondent, and so forth.

The sympathies of the court below were evidently aroused as it became familiar with the case. On one of the motions made by respondent, the court entered the per curiam order and opinion of March 5, 1942, printed as Appendix B to the Government's brief, in which it invited respondent to "have a writ of habeas corpus issued out of this court upon a duly verified petition stating the circumstances by virtue of which he asserts he was improperly deprived of a trial by jury." (See also R. 8.)

Respondent accordingly filed in the court below a petition for a writ of habeas corpus; it is printed as Appendix D to the Government's brief. It contained allegations to the effect that at no time was respondent advised by the trial judge, the United States Attorney or by anyone else, of his right to the assistance of counsel; that the trial judge did not offer to assign counsel to assist the respondent; that respondent was ignorant of his right to counsel, and represented himself because he could not pay the charges of competent counsel; that in waiving a jury trial respondent acted without the advice of counsel, and without knowledge of his rights and of the significance thereof; and that the waiver was sanctioned by the trial judge as a matter of rote, without knowing the facts and without exercising any discretion.

As the Government's brief points out (p. 4), this first petition was withdrawn. It was withdrawn at the sug-

gestion of the court below, which indicated the possibility that the case might be disposed of on a straight question of law and therefore suggested a reframing of the petition to eliminate certain allegations of fact. The new petition (R. 2-3) shows only that respondent, from the date of the indictment through the trial, acted without benefit of counsel; that respondent is not an attorney; and that respondent waived a jury trial on his own motion, signing a stipulation to that effect which was "So Ordered" by the trial judge.

The return to the writ (R. 4-6) admits the allegations of the new petition mentioned above, alleges in general terms that respondent waived his right to counsel with full knowledge of the significance of such act (paragraph 3 of the return—R. 4) and then proceeds to set forth in some detail the Government's version of the proceedings before the trial judge upon which the Government relies as showing an intelligent waiver by respondent of his right to counsel and of his right to a trial by jury (Return, paragraphs 4-9, R. 4-5). It concludes with some allegations as to respondent's experience in representing himself in various civil actions—all of which were lost by the respondent—for the purpose of showing respondent's "intelligence, experience, and familiarity with courts and legal proceedings, as bearing upon the legality of his waiver of the rights to representation by counsel and a trial by jury" (Return, paragraph 12, R. 5-6).

The return to the writ was not traversed, for the reasons indicated above, and the facts alleged in the return stand admitted for the purpose of the present proceeding. The facts so shown, with respect to the waiver of constitutional rights by the respondent, are:

On the adjourned arraignment date, upon refusal of respondent to plead, the District Court ordered a plea of not guilty to be entered and advised respondent to

retain counsel to defend himself which respondent refused to do, stating that he wanted to represent himself as the case was very complicated and he was so familiar with the details that no attorney would be able to give him as competent representation as he would be able to give himself (R. 4).

On the call of the case for trial in calendar part, the trial judge asked the respondent whether he had counsel; respondent replied that he desired to represent himself; in response to a question from the court, respondent said he was not admitted to the bar but had studied law and was sufficiently familiar therewith adequately to defend himself and was more familiar with the complicated facts of his case than any attorney could be (R. 5).

As to the waiver of the trial by jury, the return shows only that the motion to waive the jury was made by respondent, that there was "a brief discussion" between the court, the respondent, and the Assistant United States Attorney, at which it was determined that the Assistant United States Attorney should prepare the form of waiver, and that the waiver annexed to the return and approved by the court stated that respondent had been "advised by the Court of my constitutional rights" (R. 5, 7).

The court below, one judge dissenting, filed an opinion in which it decided that the conviction was unlawful and directed that the respondent be released (R. 8-11). The order entered, however, directed that the respondent be released "upon condition that the relator post bail * * * to secure his appearance to prosecute his appeal now pending in this Court * * *, and also to secure his appearance for his further trial and prosecution in the United States District Court upon said indictment" (R. 13). That order is challenged here.

Summary of Argument

I

Although the order here questioned, read literally, amounts to nothing more than an order releasing the respondent on bail, conditioned to prosecute his appeal in the court below, it should be considered in the light of the opinion below and in connection with other proceedings below. We agree with the Government that, so considered, the order is properly to be construed as an order releasing the respondent, subject only to his posting bail to appear for a new trial of the indictment or to prosecute his appeal below, if this Court should reverse the order below. If, however, this Court thinks that the order must be construed literally as an order merely reducing bail, then the writ of certiorari was improvidently granted and it should be dismissed.

II

The Circuit Court of Appeals, having acquired jurisdiction of the case by the filing of an appeal, had power to issue the writ of habeas corpus under Section 262 of the Judicial Code, since the issue of the writ was necessary and appropriate for the complete exercise of its jurisdiction. Section 262 empowers the Circuit Courts of Appeals, like the Supreme Court and the District Courts, to issue all writs "necessary for the exercise of their respective jurisdictions". Nothing in the history of the legislation relating to the issue of writs by the Federal courts indicates any Congressional intention to restrict the power of the Circuit Courts of Appeals to issue writs of habeas corpus under Section 262. In the absence of such Congressional intention, the high importance of the

writ, the desirability of a flexible procedure, and the public interest in the prompt disposition of criminal cases all indicate a liberal, rather than a strict, construction of Section 262.

Accordingly, it should be construed as affording a Circuit Court of Appeals the power to issue an original writ in any appropriate case within its jurisdiction, i. e. in any case in which an appeal has been taken (and also, although this case does not present the problem, in which an appeal can be taken), if special circumstances indicate the need for the use of the writ. This construction is supported by various cases in this Court and in the Circuit Courts of Appeals. No broad considerations of policy are opposed. Such a liberal construction would not involve an enlargement of the statutory jurisdiction of the Circuit Courts of Appeals; it would not, or at least need not, involve interlocutory review; and it affords what in many instances may be a highly convenient rather than an inconvenient method of disposing of a case within the court's appellate jurisdiction.

If the statute be so construed, the court below had the power to issue the writ in this case, as the facts found by it show that the issue of the writ was necessary and appropriate for the complete exercise of its jurisdiction. They show that the writ was issued because the court feared that otherwise, in view of the respondent's inability to obtain a transcript of the notes of the trial and consequent inability to prepare a bill of exceptions, the court's jurisdiction to review the conviction would be altogether frustrated, or at least seriously hampered.

III

The order below should be affirmed on the ground stated by the court below, *viz.*, this Court should hold that when on trial for a felony, the defendant, when not himself a

lawyer, may not waive a jury trial, except after consultation with an attorney retained by him or assigned to him, at least for that particular purpose. That holding does not question the broad conclusion, let alone the actual decision, reached by this Court in *Patton* v. *United States*, 281 U. S. 276 (1930), which said that a defendant in a criminal case, if adequately advised, could waive his constitutional right to a trial by jury.

The Court in the *Patton* case in effect charged the Federal trial courts with the duty of ascertaining that any waiver of a jury trial was an intelligent waiver and one proper under all the circumstances. One of the reasons for permitting the waiver in the *Patton* case was the fact that a defendant today, unlike the situation which prevailed in ancient days, has a complete opportunity to present a defense, including the right to be represented by counsel. The doctrine enunciated by the court below gives effect to the policy thus enunciated in the *Patton* case; it in effect defines an "intelligent waiver" of a jury trial as one made with the advice of, or after opportunity to consult with, counsel.

This doctrine does not deprive a defendant of the right to defend his case in person or to do it in his own way; he need not follow the advice of counsel. Nor is the fact that a defendant without counsel may plead guilty persuasive against the doctrine here contended for, for a layman is, at least in the great majority of the cases, far better able to judge whether or not he is guilty of a crime than whether his innocence may be better established before a judge than before a jury.

The case below, involving an indictment under the very broad and little-defined provisions of Section 215 of the Criminal Code, commonly called the mail fraud section, is an excellent example of a case which should have been tried by a jury with the advice of competent counsel.

Even if this Court is unwilling to go as far as the court below in holding that in all cases a defendant on trial for a felony must have an attorney retained by or assigned to him before he may waive a jury trial, the order below can still be affirmed. The Government's return to the writ, fairly read, sets forth all the facts on which the Government relies as showing that there was here an intelligent waiver of the right to counsel and of the right to a trial by jury. On the facts shown by the return, however, it appears that respondent was not advised of his right to counsel or offered an appointment of counsel by the court. Even more clearly it appears from the return that no effort was made by the trial judge to ascertain that there had been an intelligent waiver of the trial by jury or to exercise an informed discretion in approving the waiver. This Court should therefore affirm on the authority of the principles laid down in *Patton* v. *United States, supra,* and in *Johnson* v. *Zerbst,* 304 U. S. 458 (1937) and *Glasser* v. *United States,* 315 U. S. 60 (1941).

ARGUMENT

I.

THE ORDER CHALLENGED HERE SHOULD BE CONSTRUED AS AN ORDER RELEASING RESPONDENT SUBJECT ONLY TO HIS POSTING BOND TO APPEAR FOR A NEW TRIAL OR TO PROSECUTE HIS APPEAL IF THE ORDER IS REVERSED. IF, HOWEVER, THE ORDER IS CONSTRUED LITERALLY AS A BAIL ORDER, IT WAS ENTIRELY PROPER AND SHOULD NOT BE DISTURBED.

Respondent agrees with the position taken in the Government's brief (pp. 13-14) that the order here challenged should be read in the light of the opinion of the court below and in the light of the order of April 8, 1942 (Government's Brief, Appendix C), and that, read

in such light, the order should be construed as an order releasing the respondent, subject only to his posting bond to appear for a new trial or to prosecute his appeal below, if the order should be reversed.[1]

If, however, this Court feels that it must construe literally the order here challenged, its total effect is nothing but an order releasing respondent on bail conditioned to prosecute his appeal. As the court below stated (R. 9), it had ample authority to issue such an order under Rule VI of the Rules governing criminal appeals. This Court will not be solicitious to review the discretion of the Circuit Court of Appeals in determining the precise amount of bail.

Indeed, the Government's attack on the order, construed as an order reducing bail (Government's Brief, p. 14 footnote), does not really touch the propriety of the order. There is authority for the use of habeas corpus as a method of bringing about a release on or reduction of bail. *Housel and Walzer, Defending and Prosecuting Federal Criminal Cases*, §§ 102, 103 (1938). In any event the court below was at liberty, if if so desired, to treat the habeas corpus petition as an application for reduction of bail, and, if the order is construed as an order reducing bail, that is what the court below did.

The Government is really not complaining of the use of the writ of habeas corpus for this purpose. What

[1] After the filing of the opinion below and before entry of the order, the Government moved for an order staying execution of the order for a period of one week pending the filing of a petition for a writ of certiorari in this Court, urging that if McCann were forthwith released without bail, there was no assurance he would be available in the event of a retrial of the indictment or to prosecute his appeal in case the Government succeeded in reversing the order of the Circuit Court of Appeals. That motion was brought on simultaneously with the presentation for settlement of the order of release. The court below did not stay execution of the order but apparently in lieu thereof added to the order of release provisions concerning bail for the purpose of meeting the Government's objections.

the Government really objects to is the fact that in addition to entering the order, the court below, by its opinion, advised the respondent that if his appeal were pressed the court would hold that he had been deprived of his constitutional rights. This the Government speaks of as a "perversion" of the use of the writ of habeas corpus. It is difficult, however, to find any perversion of justice when an appellate court, having become familiar with the facts of a case before it on appeal, having ascertained the difficulties with which the respondent was faced in perfecting the appeal and having become convinced not only that respondent has been improperly convicted but that he had been deprived of rights under the constitution of the United States, tells him so.

The Government, far from objecting to this exercise of discretion by an appellate court, should be solicitous to see to it that constitutional rights involving personal liberty are not lost through ignorance.

The petition for certiorari sought review of the order challenged on the theory that it ordered the release of the respondent. If, properly construed, it simply effected a reduction in bail, the writ of certiorari should be dismissed as improvidently granted. Cf. *United States* v. *Rimer*, 220 U. S. 547 (1911).

II.

The Court Below Had the Power to Issue the Writ of Habeas Corpus in This Case.

(A) *The Circuit Court of Appeals acquired jurisdiction of the case by appeal and possessed the power to issue a writ of habeas corpus appropriate for the exercise of that jurisdiction.*

The jurisdictional question presented is whether the court below, having acquired jurisdiction of the case

through the filing of an appeal, had the power to issue a writ of habeas corpus which it determined was necessary for the complete exercise of that jurisdiction.

This is not a case like *Whitney* v. *Dick*, 202 U. S. 132 (1906) which held that a Circuit Court of Appeals was not authorized under the statute to issue original and independent writs of habeas corpus. In that case a defendant, convicted in a District Court, without suing out a writ of error, asked the Circuit Court of Appeals to issue either a writ of habeas corpus or a writ of certiorari. The Circuit Court of Appeals issued a writ of certiorari, and on the return ordered the petitioner discharged on the ground that the District Court had had no jurisdiction of the offense. No reason whatsoever for the use of certiorari rather than a writ of error was advanced in the petition or indicated by the Circuit Court of Appeals.

This Court reversed. Pointing out that the powers of the Circuit Courts of Appeals are only those granted by statute, and that no statutory provision expressly conferred on them the power to issue writs of habeas corpus, it held that a Circuit Court of Appeals had no power to issue a writ of habeas corpus in an independent and original proceeding, when there was no proceeding of an appellate character pending in the Circuit Court of Appeals. It thought that Section 716 of the Revised Statutes, which authorized the issue of "all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law", could not authorize the issue of a writ of habeas corpus by a Circuit Court of Appeals except in a case pending before it on appeal.

As to the power to issue a writ of certiorari, the Court apparently thought that Section 716 of the Revised Statutes conferred power on the Circuit Court of Appeals

to issue such a writ, but held that in the particular case there was no special reason why the ordinary procedure by way of writ of error should not have been followed.

Whitney v. *Dick* was obviously correctly decided on the facts there presented, in view of the absence of any showing as to the necessity for the use either of habeas corpus or of certiorari.

If it were necessary to do so, however, respondent would ask this Court to reconsider the reasoning which led the Court in *Whitney* v. *Dick* to its conclusion with respect to the use of habeas corpus.

The history of the legislation relating to the issue of writs by the Federal courts seems to show no Congressional intention to deprive the Circuit Court of Appeals of the power to issue the writ of habeas corpus in appropriate cases within their jurisdiction. Prior to the establishment of the Circuit Courts of Appeals by the Act of March 3, 1891, Chapter 517 (26 Stat. 826), the provisions relating to the issue of writs by the Federal courts were found in Revised Statutes Section 716, empowering the Supreme Court, the Circuit Courts and the District Courts to issue all writs not specifically provided for by statute necessary for the exercise of their respective jurisdictions, etc.; Revised Statutes Section 751, empowering the Supreme Court, the Circuit Courts and the District Courts to issue writs of habeas corpus; and Revised Statutes Section 752, empowering the justices and judges of said courts, within their respective jurisdictions, to grant writs of habeas corpus.

The Circuit Courts of Appeals Act made expressly applicable to the Circuit Courts of Appeals the provisions of Revised Statutes Section 716. Revised Statutes Sections 751 and 752 were not so made applicable, and the Government's brief suggests (pp. 20-22) that the failure to make Section 751 applicable indicates an intention to

limit the use of habeas corpus by the Circuit Courts of Appeals under Section 716. But there seems to be no basis for such a suggestion.

It had early been decided by this Court that the grant of the power to issue writs of habeas corpus was an express and independent grant not limited to cases otherwise within its jurisdiction. *Ex parte Bollman*, 4 Cranch 75 (1807). To have extended that section to the Circuit Courts of Appeals would accordingly have given those Courts power to deal with cases not otherwise within their appellate jurisdiction. There is, however, no reason to believe that this unwillingness of Congress (assuming it to have been more than an oversight) to confer the power found in Section 751 indicates any intention that the Circuit Courts of Appeals should not have the power to issue the writ under Section 716 (now found in Section 262 of the Judicial Code) in appropriate cases within their jurisdiction.

If there was no such Congressional intent, there was and is every reason for a liberal rather than a strict construction of Section 716 (now in substance embodied in Section 262 of the Judicial Code). The great importance of the writ of habeas corpus and the desirability of a flexible procedure in the Federal courts alone are sufficient to cause the adoption of a generous rather than a limited construction of that section.

On any reconsideration of the reasoning in *Whitney* v. *Dick*, respondent would urge that Section 716, properly construed, empowers a Circuit Court of Appeals to issue a writ of habeas corpus, on a proper showing of necessity, in any case in which an appeal has been or can be taken to that Court. Such a rule would not enlarge the jurisdiction of the Circuit Courts of Appeals; they would still exercise only an appellate jurisdiction, in cases in which jurisdiction has been conferred on them by the

Congress; but they would not be denied the power to exercise their statutory jurisdiction by whatever means, or in whatever form, might be most appropriate under all the circumstances of the case. Such a construction of Section 716 was adopted by this Court, in dealing with the right of a Circuit Court of Appeals to issue a writ of mandamus, in *McClelland* v. *Carland*, 217 U. S. 268 (1910), and indeed it was the view taken of the power of a Circuit Court of Appeals to issue a writ of certiorari in *Whitney* v. *Dick* itself. It is not apparent why the same construction should not be adopted where the writ of habeas corpus is concerned.

But respondent need not ask a reconsideration of the ground of decision in *Whitney* v. *Dick*. That decision was limited to situations in which "there was no proceeding of an appellate character pending" in the Circuit Court of Appeals, and it recognized that the issue of the writ was authorized "when necessary for and in aid of the exercise of the jurisdiction already otherwise obtained" (202 U. S. at p. 137). Here the writ was issued in a case of which the Circuit Court of Appeals already had jurisdiction, a case in which, in fact, many proceedings had already taken place before the Court of Appeals. As the opinion below noted, nothing in the *Whitney* v. *Dick* opinion is helpful in determining what this Court had in mind as the cases in which a writ of habeas corpus might be "necessary to the complete exercise of the appellate jurisdiction", and accordingly it is quite clear that nothing in *Whitney* v. *Dick* is persuasive one way or the other on the question before the Court.

And it is submitted that few, if any, of the other decisions on the jurisdictional point, collected in the Government's learned and exhaustive brief, offers this Court much help in the solution of this problem. Prior to the decision in *Whitney* v. *Dick*, there were other cases in the Circuit Courts of Appeals in which those courts had

issued original writs in cases in which, for one reason or another, there was no appellate jurisdiction in the Circuit Court of Appeals. *Ex parte Buskirk*, 72 Fed. 14, 22 (C. C. A. 4, 1896); *Ex parte Moran*, 144 Fed. 594 (C. C. A. 8, 1906). No contention is here made that those cases were correctly decided, for they involved the use of an original writ for the purpose of passing upon a case which otherwise could never have come before the court, i. e. for the purpose of enlarging, in a substantive sense, the jurisdiction of the court.

The Government's brief (pp. 15, 26-27) purports to find a conflict, in the decisions of the Circuit Courts of Appeals after *Whitney* v. *Dick*, on the question whether Section 262 of the Judicial Code authorizes the issue of original writs in cases in which a right of appeal exists but "because of the presence of 'imperatively demanding circumstances' a departure from the ordinary remedy • • • by appeal is necessary." A reading of the cases, however, shows that no real conflict exists on any such question. Cases like *Minnesota & Ontario Paper Co.* v. *Molyneaux*, 70 F. (2d) 545 (C. C. A. 8, 1934) and *Whittel* v. *Roche*, 88 F. (2d) 366 (C. C. A. 9, 1937) and the other cases cited in the Government's brief, page 27, support such a principle. But the cases cited as contra (Government's Brief, pp. 24 and 26) do not militate against the power to issue an original writ in a proper case in which appellate jurisdiction exists. Indeed, with few exceptions (e. g. *Travis County* v. *King Iron Bridge & Mfg. Company*, 92 Fed. 690 (C. C. A. 5, 1899)), the cases cited recognize that power. In several cases, however, the court disclaimed power to issue the writ because the case was one which the court had no power to review on appeal. See, e. g., *Pickwick-Greyhound Lines* v. *Shattuck*, 61 F. (2d) 485 (C. C. A. 10, 1932); *In re Eilers Music House*, 284 Fed. 815 (C. C. A. 9, 1922), cert. denied, 257 U. S. 646; *In re Paquet*, 114 Fed. 437 (C. C. A. 5, 1902); *Hammond Lumber Co.* v. *United States District*

Court, 240 Fed. 924 (C. C. A. 9, 1917) (alternative ground). In none of them had an appeal been taken, and some of them were decided on that ground in reliance on *Whitney* v. *Dick*. See, e. g., *Dooley Improvements* v. *Nields*, 72 F. (2d) 638 (C. C. A. 3, 1934); *Keaton* v. *Kennamer*, 42 F. (2d) 814 (C. C. A. 10, 1930). Cf. *Travis County* v. *King Iron Bridge & Mfg. Company*, 92 Fed. 690 (C. C. A. 5, 1899); *Hammond Lumber Co.* v. *United States District Court*, *supra*. In none of them was there any indication that in a proper case, in which an appeal had been taken, the power to issue the writ would not exist.

The Government's brief seeks to show that the cases in the Circuit Courts of Appeals which expressly assert the power to issue an original writ in cases of special need are the result of reliance upon an allegedly erroneous dictum from *In re Chetwood*, 165 U. S. 443 (1897), in which the Court referred to Section 262 (then R. S. Sec. 716) as authorizing the Federal courts to "issue all writs, not specifically provided for by statute, which may be agreeable to the usages and principles of law." Because the Court omitted express reference to the requirement that the writ be "necessary for the exercise of their respective jurisdictions," the Government's brief assumes that the Court overlooked it. But it is far more likely that the Court, assuming that the Federal courts would act only within their respective jurisdictions, thought that the omitted clause required no more than that, and therefore needed no mention.

The statement from *In re Chetwood* attacked by the Government because of the supposed oversight of the court in examining the statute is to the effect that, although the writ of certiorari "had been ordinarily used as an auxiliary process merely, yet, whenever the circumstances imperatively demand that form of interposition the writ may be allowed, as at common law, to correct

excesses of jurisdiction and in furtherance of justice." Whatever the merits of the Government's suggestion that the statement just quoted was made because of the Court's failure to read the entire statutory provision, that explanation cannot be made of later cases in which the same principle was laid down. The statement was quoted with approval, or the same rule stated, in *United States* v. *Dickinson*, 213 U. S. 92 (1909); *McClelland* v. *Carland*, 217 U. S. 268 (1910); *United States* v. *Beatty*, 232 U. S. 463 (1914) and *Ex parte United States*, 287 U. S. 241 (1932), in each of which the Court correctly quoted or summarized the entire statutory provision.

In two of the cases just mentioned the Court, while approving the rule announced in the *Chetwood* case, refused to issue the writ on the ground that nothing was involved but mere error.

> "But the distinction between preventing excesses of jurisdiction and the mere correction of error is a fundamental one, and the rule remains that appeal and writ of error, being the proper forms of procedure provided for the mere correction of error, the appellate jurisdiction of this court for that purpose is limited to the cases in which express provision is made for appeals or writs of error, and that certiorari cannot be independently used to supply the place of a writ of error for the mere correction of error." *United States* v. *Dickinson*, 213 U. S. 92, at page 102.
>
> *Cf. United States* v. *Beatty*, 232 U. S. 463, at pages 467-8.

These two cases thus distinguish between the use of extraordinary writs "to prevent excesses of jurisdiction" which is permissible in appropriate cases, and their use for "the mere correction of error", which is not permissible. At least analogous is the doctrine, well established in the decisions in this Court and here conceded by the Government (Government's Brief, footnote, pp. 16-17)

that habeas corpus is a proper remedy if the court had no jurisdiction to try the petitioner or if fundamental constitutional rights had been denied him. *Bowen* v. *Johnston*, 306 U. S. 19, 24 (1939) Cf. *Riggins* v. *United States*, 199 U. S. 547 (1905) where the Court disapproved of the use of habeas corpus for the mere correction of error; accord, *United States* v. *Valante*, 264 U. S. 563 (1924).

The real point for decision here is the meaning which ought to be attached to the phrase in Section 262 empowering the courts to issue writs "necessary for the exercise of their respective jurisdictions." Ordinarily a grant of power to do what is necessary for a given purpose is a grant of power of what is reasonably calculated to bring about that purpose. "To employ the means necessary to an end, is generally understood as employing any means calculated to produce the end * * *" *McCulloch* v. *Maryland*, 4 Wheaton, 316, 413 (1819). No reason is apparent here why this phrase in Section 262 of the Judicial Code should not be construed in a like spirit in the interests of the flexible, prompt and efficient functioning of the Federal courts and particularly in the public interest in the prompt disposition of criminal cases. See *Ex parte United States*, 287 U. S. 241, at 249; *Ex parte Siebold*, 100 U. S. 371, 375 (1879).

The Government's main argument, implicit rather than stated, seems to be that an extraordinary writ cannot be issued under Section 262 in a case within the appellate jurisdiction unless, as a result of the issue of the writ, the case will be disposed of by an affirmance or a reversal. This is apparently what is meant by the contention advanced by the Government in various places that an original writ cannot be used as a substitute for an appeal. It is also what is meant by the Government's insistence that the writs can be used only as an auxiliary to the jurisdiction to review *by appeal*. Under this construction the writ was unauthorized in the present case, because it

in effect disposed of the appeal and rendered unnecessary an affirmance or a reversal.

Such a construction is, of course, entirely inconsistent with the *Chetwood*, *McClelland* and *Beatty* and other similar cases of this Court referred to above. A contrary construction is supported by the more recent cases in the Circuit Courts of Appeals. *Whittel* v. *Roche*, 88 F. (2d) 366 (C. C. A. 9, 1937); *Greyerbiehl* v. *Hughes Electric Co.*, 294 Fed. 802 (C. C. A. 8, 1923); *Grable* v. *Killits*, 282 Fed. 185 (C. C. A. 6, 1922), cert. denied 260 U. S. 735; *United States* v. *Malmin*, 272 Fed. 785 (C. C. A. 3, 1921).

In *Whittel* v. *Roche*, the court expressly rejected the view that issuance of the writ was within its power only when the case was thereby brought before it on appeal and issued a writ of mandamus to compel the District Court to grant plaintiff's motion to dismiss his suit. Similarly in the *Greyerbiehl* case, the court issued a writ of certiorari to review a decision of the District Court after the time for filing a writ of error had expired, while in the *Grable* case the court issued a writ of mandamus in aid of a general appellate jurisdiction not actually evoked by appeal, the court stating:

> "* * * Petitioners should not be required to await the slow process of an appeal from such invalid order, whose operation meanwhile involves an encroachment upon their rights" (p. 196).

Indeed, in *United States* v. *Malmin*, the Circuit Court of Appeals issued a writ of mandamus requiring a District Judge in the Virgin Islands to resume his office and duties, and justified the issuance of this writ as an exercise of its appellate jurisdiction, although not only was an appeal not pending before the court but the writ was issued without reference to any case from which an appeal might have been taken.

Nothing in the language of Section 262 compels acceptance of the construction urged by the Government.

The phrase "necessary for the exercise of their respective jurisdictions" can easily be construed as intended only to prevent the courts from acting in cases not within their respective jurisdictions. Without such a limiting clause, a grant of the power to issue original writs would have permitted the courts to deal with cases which could otherwise never have come before them and thus would have involved substantial enlargement of their jurisdictions.

This is not to say that a Circuit Court of Appeals would or should issue the writ merely because it has the power to do so. There remains the factor of the court's discretion which has been accorded all too narrow a place in the Government's brief. Writs of habeas corpus, certiorari, mandamus and prohibition are extraordinary writs and "This court has never decided that [they are] to be resorted to in place of a writ of error whenever it suited the convenience of parties. There must be 'circumstances imperatively demanding' a departure from the ordinary remedy by writ or error or appeal". *Whitney* v. *Dick*, 202 U. S. 132, at 140.[2] Cf. *Minnesota & Ontario Paper Company* v. *Molyneaux*, 70 F. (2d) 545 (C. C. A. 8, 1934).

Certainly no broad considerations of policy militate against the construction here urged. The "familiar policies which deny review at interlocutory stages" (Government's Brief, p. 8) certainly have no application in the present case where the effect of the issue of the writ was to dispose of a case which had already, for that matter, been finally decided below. If it be urged that the

[2] That this statement was addressed to the habeas corpus proceeding as well as to certiorari, contrary to the suggestion made in footnote 25 on page 27 of the Government's brief, and that it refers to a court's discretion rather than its jurisdiction is shown by the next paragraph of the Court's opinion in which it compared certiorari with habeas corpus and stated that "the latest expression of the views of this court is to be found in *Riggins* v. *United States*, 199 U. S. 547"—a case in which this Court held that the Circuit Court improperly issued a writ of habeas corpus.

power to issue original writs could be used in other cases as a device for review at interlocutory stages, the answer is, first, that the statute need not be construed to permit the issue of original writs unless, under all the circumstances—including the operation of any policy against interlocutory review—it is appropriate, and second, that even if the statute be construed to give full power to the Circuit Court of Appeals, in its discretion, to issue these writs, there is no reason for any assumption that the Circuit Court of Appeals will abuse their discretion. If they do, the discretion is subject to the control of this Court.

Nor is it evident that the power to issue original writs under the circumstances here present would be "highly inconvenient" (Government's Brief, p. 8). The court below did not find it so; on the contrary it found it highly convenient. Nor is it clear why the facilities of the Circuit Courts of Appeals for hearing cases involving disputed facts outside of the record are any less satisfactory than those of the District Court, or why such facilities of the Circuit Court of Appeals sitting *in banc* are less satisfactory than those of a circuit judge sitting alone. Yet any of the circuit judges, sitting alone, could have issued the writ. Section 452 of Title 28, U. S. C.

Since the court below, by the use of the writ, did no more than dispose of a case within its appellate jurisdiction, and particularly as admittedly any one of the circuit judges could have taken the action which the court below took, it is a little difficult to understand the Government's strong position on the jurisdictional question. It smacks of a formalism long since outmoded. The respondent and the Government have had a determination of an issue which is decisive of the case; if the court below is right on the merits, substantial justice has been done. Centuries ago such questions of form were all important; whether an action sounded in trespass or in trespass on the case determined many an important litigation regardless of the merits; but happily those days are done.

(B) *The writ of habeas corpus was necessary and appropriate for the complete exercise of the jurisdiction of the Circuit Court of Appeals in this case.*

The court below, familiar with the opinion in *Whitney v. Dick*, issued the writ of habeas corpus only after an express finding that the writ was necessary to the complete exercise of the court's appellate jurisdiction. The court so found:

> "because for the reasons we have given there is a danger that it [the court's appellate jurisdiction] cannot be otherwise exercised at all and a certainty that it must in any event be a good deal hampered" (R. 9).

The court, from the various proceedings theretofore had before it in connection with the various motions of the respondent mentioned above (*supra*, pp. 2, 3) knew that the respondent on his appeal would rely not only upon the denial of constitutional rights challenged by the writ of habeas corpus, but upon other alleged serious errors, including a claim that the conviction was not supported by the testimony. The court knew, also, that a complete transcript or digest of the testimony and proceedings at the trial was necessary if the respondent was to prepare a satisfactory bill of exceptions. The court pointed out (R. 8) that the minutes had never been typed, that respondent had no money and that until recently had had no lawyer to represent him, and accordingly that "it is at least doubtful whether any [bill of exceptions] can ever be made up on which the appeal can be heard".

The court knew also that the minutes of the testimony and proceedings were in the hands of a private reporter who required the payment of $1,200 before the minutes could be typed and that respondent was unable to procure access to these minutes; for on January 5, 1942, it had entered an order denying respondent's motion to compel

the Government to give him access to the minutes at its expense but granting, as alternative relief, the right to respondent to prepare the best bill of exceptions which he could prepare in the circumstances. A copy of that order has been filed with the Clerk of this Court, and is printed as Appendix B to this brief.

The court, accordingly, concluded that it was at least doubtful whether the appeal ever could be heard (R. 8). It is true that the court did say that a bill of exceptions *might* be prepared which would be confined to the single point raised by the writ (R. 9). The Government, turning this into a statement that a bill of exceptions *could* be prepared if confined to that point, urges that no case for the use of an extraordinary writ has been made out. The Circuit Court of Appeals, however, quite properly felt that justice would not require the respondent, by attempting to prepare a bill of exceptions confined to the one question, to waive all other errors committed at the trial.

Respondent respectfully submits that the considered finding of the Circuit Court of Appeals should not be lightly set aside.

III.

THE ORDER OF THE COURT BELOW DISCHARGING RESPONDENT MUST BE AFFIRMED, SINCE THE RECORD ESTABLISHES THAT RESPONDENT'S CONSTITUTIONAL RIGHTS TO A TRIAL BY JURY AND ASSISTANCE OF COUNSEL WERE DENIED.

Respondent submits that this order should be affirmed on the ground set forth by the court below, namely, that, as a matter of law, a defendant on trial for a felony should not be permitted to waive trial by jury without the advice of counsel, at least as to that particular point.

But even if this Court should reject that salutary rule, respondent submits that the order must be affirmed be-

cause the record discloses a violation of respondent's constitutional rights to trial by jury and assistance of counsel by the trial court: that respondent could not have intelligently waived his right to assistance of counsel and trial by jury because he was not fully apprised of either right; and that by reason thereof the trial court lost its jurisdiction, a fact which this Court may notice, and on the basis of which it should affirm the order on the authority of *Patton* v. *United States*, 281 U. S. 276 (1930) and *Johnson* v. *Zerbst*, 304 U. S. 458 (1938).

A. *The importance of respondent's right to trial by jury was such that its adequate protection required the advice of counsel as a condition precedent to an intelligent waiver of that right.*

The right of an accused, accorded by the Sixth Amendment to the Constitution of the United States, to "enjoy the right * * * to have the assistance of counsel for his defense" has been too recently before this Court for us to do more than indicate its vital importance. As this Court has said in *Johnson* v. *Zerbst, supra*, at page 462:

> "The Sixth Admendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done.' It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel. That which is simple, orderly and necessary to the lawyer, to the untrained layman may appear intricate, complex and mysterious. Consistently with the wise policy of the Sixth Amendment and other parts of our fundamental charter, this Court has pointed to '* * * the humane policy of the modern criminal law * * *' which now provides that a defendant '* * * if he be poor, * * * may have counsel furnished him by the state * * * not infrequently * * * more able than the attorney for the state.'"

Similarly, the importance of an accused's right to a "speedy and public trial by an impartial jury of the State and district wherein the crime shall have been committed", accorded by the same amendment, is too well known and understood to require extended discussion. In summary, we can do no better than quote the reasons assigned by the court below for the importance of this right:

> "* * * The institution of trial by jury—especially in criminal cases—has its hold upon public favor chiefly for two reasons. The individual can forfeit his liberty—to say nothing of his life—only at the hands of those who, unlike any official, are in no wise accountable, directly, or indirectly, for what they do, and who at once separate and melt anonymously in the community from which they came. Moreover, since if they acquit their verdict is final, no one is likely to suffer of whose conduct they do not morally disapprove; and this introduces a slack into the enforcement of law, tempering its rigor by the mollifying influence of current ethical conventions. A trial by any jury, however small, preserves both these fundamental elements and a trial by a judge preserves neither at least to anything like the same degree" (R. 10, 11).

Despite the importance of these rights, this Court has indicated, and for the purpose of this case we may concede, that either right may be waived, although it does not necessarily follow that both rights may be concurrently waived.

> *Patton* v. *United States, supra;*
> *Johnson* v. *Zerbst, supra.*

Although the *Patton* case decided only that the accused might lawfully consent to a jury of less than twelve (eleven), this Court was plainly concerned to protect even that small measure of surrender, as appears from the language with which it hedged the accused's power:

> "In affirming the power of the defendant in any criminal case to waive a trial by a constitutional jury

and submit to trial by a jury of less than twelve persons, or by the court, we do not mean to hold that the waiver must be put into effect at all events. * * * Trial by jury is the normal and, with occasional exceptions, the preferable mode of disposing of issues of fact in criminal cases above the grade of petty offenses. In such cases the value and appropriateness of jury trial have been established by long experience, and are not now to be denied. Not only must the right of the accused to a trial by a constitutional jury be jealously preserved, but the maintenance of the jury as a fact finding body in criminal cases is of such importance and has such a place in our traditions, that, before any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity."

Patton v. *United States, supra*, at 312-313.

The court below did not question the broad conclusion reached by this Court in the *Patton* case, nor do we suggest its reexamination at this time. What the court below did was to give effect to the admonition of this Court in the *Patton* case that the intelligent consent of the defendant must be secured for any waiver of a jury trial, and that the duty of the trial court in that regard must be discharged with a careful discretion increasing as the gravity of the offense increases. The court below felt that it was wise and proper to insist, before any finding of an intelligent waiver of a jury trial can be made, that the defendant have the advice of counsel at least on that point. This doctrine is not only wholly consistent with the reasoning in the *Patton* case; it is suggested by the fact

that the *Patton* decision advanced as an important reason for permitting waiver of a trial by jury the fact that the defendant "now charged with crime is furnished the most complete opportunity for making his defense. * * * [including the right]; if he be poor, [to] have counsel furnished him by the state * * *" *Patton* v. *United States*, 281 U. S. 276, at 308.

This Court in the *Patton* case thus indicated that it meant a defendant's consent to trial without jury to be jealously scrutinized even where, as there, defendant had counsel who concurred in the waiver. If such safeguards are to be thrown about a defendant attended by counsel, why should not this Court "treat it as a critical circumstance" that a defendant be given the protection of the advice of counsel where waiver of a jury trial is in question, even though the advice is confined to that one question. An effective way to safeguard the constitutional right to trial by jury is to throw about it the protection of another constitutional right—the assistance of counsel. Such a doctrine would lessen rather than increase the burden of the trial court, and would tend to provide a defendant with helpful advice of a character which the trial court might not be able to give.

The Government's brief to the contrary notwithstanding (pp. 42-43), the doctrine announced by the court below does not deprive a defendant who desires to represent himself of the right to waive a trial by jury. He may still waive that right although counsel whom he consults may advise against it. The doctrine would seem to require no more than that the court appoint counsel for a defendant who, in a serious felony case, desires to waive trial by jury, and thus at least subject the defendant to a presumably wiser influence. Compare the procedure followed in *Zahn* v. *Hudspeth*, 102 F. (2d) 759 (C. C. A. 10, 1939) in which, although the defendant refused the trial court's offer to appoint counsel, the trial court nevertheless appointed an attorney to sit with the defendant and

to be available for advice in case the defendant should be willing to take it.

The Government's solicitude for the right of a defendant to manage his own cause personally, and its objection that the rule adopted below violates that right, as conferred by Section 272 of the Judicial Code, is no less surprising. Applying as it does, the *laissez faire* doctrine of classical economics to the constitutional protection of political rights and human liberties, this argument is more than faintly reminiscent of an advocacy which, at one time, upheld the right of every human being to work for less than a living wage. In any event, the argument based on the right of parties to manage their own causes personally proves too much. The right of a defendant represented by counsel to waive a jury trial is, under the doctrine of *Patton* v. *United States*, no more absolute than that of a defendant without counsel. Even when the defendant has counsel, it is clear that the United States Attorney may prevent the waiver, and, moreover, the *Patton* case makes it clear that the trial judge has and should exercise, in a proper case, the power to refuse to approve the waiver.

The Government's argument based on the power of defendant to plead guilty whether with or without counsel is hardly persuasive. As this court has often pointed out, a layman is ordinarily simply not competent to understand the problems which he faces on the trial of a case, and, at least in many cases not knowing what the real issues may be, a layman certainly is not competent to appraise his relative chances before a jury and a judge. On the other hand, certainly in the ordinary case the defendant knows whether or not he is guilty of the crime charged. It is true that there could be cases in which a defendant's guilt does not depend upon facts within his own knowledge but upon the legal effect of such facts or the construction of a statute; but it is hardly an argument against the rule adopted by the court below that its merit may be such as

to require its extension to analogous situations. There is certainly a great deal to be said against accepting a plea of guilty without legal advice in any case in which a layman would not ordinarily know whether or not he is guilty.

The reasons for the importance of trial by jury, referred to in the opinion of the court below, are well illustrated in the present case, as is the importance of counsel in making a decision on the question of a waiver of that right. The Government's brief (p. 46) points out that there is nothing in the record to indicate "that the absence of counsel and of jury resulted in any injustice or, indeed, any mistake in strategy which might have been avoided had there been a jury", and the brief goes on to point out that respondent has not suggested that the result would have been different had he been tried by a jury or been advised by counsel. But certainly the question of respondent's innocence or guilt is aside from the question here under consideration, nor can the question of the existence of constitutional rights be decided by an examination in each case into the question of whether a different result would have obtained if the constitutional rights had not been denied.

Although the question of innocence or guilt is not open here, it is perhaps important to refer to the statute under which the respondent was indicted and convicted. The important parts of the statute—which is set forth in full in Appendix A to this brief—provide that:

> "Whoever, having devised or intending to devise any scheme or artifice to defraud * * * shall, for the purpose of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any * * * writing, * * * in any * * * letter box of the United States, * * * shall be fined not more than $1,000, or imprisoned not more than five years, or both." (Crim. Code, § 215; 18 U. S. C., § 338.)

The sweeping breadth of the statute is at once apparent to a legally trained mind. An examination of the authorities shows no restriction by judicial construction. Numerous decisions establish the fact that all that is necessary to convict under this statute is proof that the defendant devised a scheme with intent to defraud, and that thereafter he used the mails in executing or attempting to execute the scheme: *Durland* v. *United States*, 161 U. S. 306, 315 (1896). To uphold an indictment or to sustain a conviction, it is not necessary to show that the defendant intended to use the mails at the time the scheme was devised, *Brewer* v. *United States*, 290 Fed. 807, 808 (C. C. A. 2, 1923), cert. den. 263 U. S. 707; *United States* v. *Young*, 232 U. S. 155 (1914); that any one was, in fact, defrauded, *Durland* v. *United States*, *supra*; or that the defendant received any benefit whatsoever. *Calnay* v. *United States*, 1 F. (2d) 926 (C. C. A. 9, 1924).

In view of the fact that a sufficient indictment may thus allege apparently innocuous acts, with the single exception of a general allegation that an intent to defraud existed at the time of such acts, it is little wonder that the reaction of the innocent layman to such an indictment is that such acts cannot be a crime, and that the only question involved is one of law, as is perhaps evidenced in this case by the number of motions which were addressed to the sufficiency of the indictment (R. 4, 5).

A competent lawyer, however, would have accepted the situation revealed by his examination of the statute and of the judicial authorities construing it. He would have seen that the sweep in this statute was so broad that the result, while perhaps necessary to combat the ingenuity of individuals whom Congress sought to reach, was to foreclose to a defendant indicted thereunder practically any defense in law. He would probably have advised respondent, first, that as the acts charged were of themselves innocuous, and the whole question of guilt turned on intention, a jury, charged not to find guilt if a reasonable doubt

exists, would be less likely to convict than a judge; and, second, that this would be particularly true where the trial judge is a judge from another and distant section of the country, presumably unfamiliar and perhaps unsympathetic with the business customs and practices of the district where the offenses were charged to have taken place and the trial held. Here the indictment involved transactions in securities, at least most of which took place in the Southern District of New York; the judge was from Missouri (R. 2).

The rule adopted by the court below, on the facts in this case, should be affirmed by this Court. It does not follow, as the Government would have us believe, that, because a defendant may waive, under appropriate circumstances, either the right to a trial by jury or the right to assistance of counsel, the surrender of the two rights in the same case cannot constitute the loss of a greater right than either individually confers.

B. *The record here shows no intelligent waiver of the right to counsel or of the right to a trial by jury, and this Court should affirm on that ground.*

Unquestionably the court below decided the case on a straight question of law reduced to "the barest possible form: * * * Limiting ourselves therefore to the exact situation before us, we hold that when on trial for a felony, the accused—at least when not himself a lawyer—may not consent to be tried by a judge except upon the advice of an attorney, retained by him or assigned to him, even though that advice extends to no more than that particular choice" (R. 10, 11).

Nevertheless, we venture to suggest to this Court that, even if it be unwilling to go as far as to sustain in the abstract the holding below, the order below may still be affirmed. We suggest that on the record—on the undisputed facts set forth by the Government in the return

to the writ—it appears that there was not an intelligent waiver of the right to counsel and of the right to a trial by jury, and that therefore, under settled decisions of this Court, the order below should be affirmed. Respondent is free to sustain the order below on any legal ground which will support it. *Ryerson* v. *United States*, 312 U. S. 405, 408 (1941).

As pointed out *supra*, pages 3, 4, the original petition for habeas corpus contained detailed allegations showing that respondent was not aware of his right to counsel or of the significance of his right to a trial by jury. Those allegations would clearly have raised the validity of the waiver of the right to counsel and of the right to a trial by jury under the decisions of this Court in *Johnson* v. *Zerbst*, 304 U. S. 458 (1938) and *Patton* v. *United States*, 281 U. S. 276, 312 (1930). That petition was withdrawn at the court's suggestion, and the substituted petition, it is true, did not contain the same allegations. It simply stated that respondent was a layman, that at no time had he had the aid of counsel, and that a trial by jury had been waived by him in the following manner as shown by the court clerk's minutes (R. 2):

> "'July 7th, 1941: Room 318:
>
> Mathias F. Correa, U. S. Attorney by Richard J. Burke.
>
> Gene McCann, Pro se.
>
> Honorable Merrill E. Otis, District Court Judge, Presiding.
>
> Defendant moves to waive trial by jury and the Court to decide issues of fact. Motion granted on consent of U. S. Attorney.'"

Finally the substituted petition alleged denial of his constitutional rights in general terms (Petition, paragraphs Fourth and Fifth, R. 3).

The return, denying none of the allegations of the substituted petition except the general allegations contained

in paragraphs Fourth and Fifth, set forth the facts, and apparently all the facts, on which the Government relies to show that the respondent intelligently and legally waived his constitutional rights.

The substituted petition was probably sufficient to raise the question of denial of respondent's rights to counsel and to a jury trial, as well as the validity of any waiver thereof. As this Court has said "A petition for habeas corpus ought not to be scrutinized with technical nicety". *Holiday* v. *Johnston*, 313 U. S. 342, 350 (1941). In any case, the Government in its return has treated the petition as sufficiently raising such issues, and has supplied facts, admitted for purposes of this proceeding, sufficient to enable those issues to be determined. We think the return fairly shows on its face that it was intended by the Government to be as strong a statement of the facts as could be made in favor of the validity of the waiver of the constitutional rights here involved. It was presumably prepared by, and in any event was supported by an affidavit of, the Assistant United States Attorney who tried the case in the District Court (R. 7).

On the facts set forth in the return, it is evident that the trial court neither fully advised respondent of his right to counsel, nor undertook in any real sense to pass on the important question whether to accept the waiver of a jury trial, nor attempted in any way to appraise respondent of the significance of that waiver.

First, as to the state of the record with respect to the waiver of right to counsel. It is not disputed that respondent was without funds and unable to obtain counsel to defend himself. Of this, of course, the trial judge had no knowledge as far as appears from the record. Although the question of counsel was twice mentioned—once at the arraignment and once when the case was called for trial (R. 4-5, Return, paragraphs 6, 8), the court did not inquire of respondent why he was not repre-

sented by counsel, it did not advise him of his right to counsel and did not tell him that the court would assign counsel if he were without funds for the purpose. Nowhere in the record is it suggested that respondent was aware of such rights. All the record does show is that the trial court recommended that respondent retain counsel, and that respondent, stating his desire to represent himself, did not assign poverty as a reason.

To bolster its position the Government (R. 5-6, Return, Par. 12) mentions previous civil litigation in which respondent had represented himself. It "refers to this testimony to show petitioner's intelligence, experience and familiarity with courts and legal proceedings as bearing upon the legality of his waiver of the rights to representation by counsel and of trial by jury." Respondent's previous experience in civil litigation, however, certainly did not tend to teach him that he was entitled as of right to the appointment of counsel in criminal litigation if he was without funds. It is understandable that he should be of the opinion that he was better able to defend himself than would any attorney that he might procure (R. 4-5, Return, pars. 6, 8), in view of his impoverished condition. All this could have been elicited with little effort by the trial court, but was not.

Nothing in the record, therefore, shows an intentional waiver of a known right to the appointment of counsel. It is true that paragraph 3 of the return does state in general terms that respondent knowingly waived his right to the advice and assistance of counsel with full knowledge of the significance of such act (R. 4). That general allegation, however, should be read in the light of, and regarded only as a conclusion based upon, the detailed allegations with respect to the waiver of counsel set forth in paragraphs 4 to 8 and 10 to 12 of the return.

The record furnishes even less ground for believing that there was any intelligent waiver of a trial by jury.

The petition shows the bare fact of the waiver, as shown by the minutes of the clerk of the court (R. 2, *supra*, p. 33). The return supplements the minutes, showing what actually happened:

> "Upon information and belief, petitioner then moved to have the case tried without a jury by the judge alone. There was a brief discussion between the Court, the petitioner, and the Assistant United States Attorney, at which it was determined that a form of waiver of petitioner's constitutional right to a jury trial should be prepared by the Assistant United States Attorney. Such a waiver was prepared and a copy thereof is hereto annexed and marked 'Exhibit A.' It was executed in writing by the petitioner and approved by the Assistant United States Attorney and by the Court" (R. 5—Return, Par. 9).

In this perfunctory fashion respondent was permitted to make the most important decision which confronted him on the trial. Respondent's proposal to waive a jury brought forth not an attitude of solicitude on the part of the trial judge, but a "brief discussion," the only purpose of which, as far as the return shows, was to make sure that the waiver was put in proper form by the Assistant United States Attorney and duly signed by the respondent. This record affirmatively shows that the trial court did not take cognizance of the important duty with which it was charged by the decisions of this Court in *Patton* v. *United States*, *supra*, and *Glasser* v. *United States*, 315 U. S. 60, 71 (1942). As the Glasser opinion stated, "Upon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused."

Surely something more than this was what the Court had in mind when, in *Patton* v. *United States*, it took the grave step of sanctioning the waiver of a jury trial with a mandate to the trial courts to exercise a sound and advised discretion in determining whether to permit the waiver.

It is hardly necessary to point out that the trial court's neglect in this respect was aggravated by its previous failure to ascertain the true situation with respect to respondents lack of counsel and to apprise him fully of his right to have counsel appointed to defend him. The measure of the trial judges' duty was first defined by this Court in a case in which the defendant was represented by counsel of his own choice who concurred in the waiver. How much greater that measure should be where defendant is without counsel was indicated by the Court of Appeals for the Fifth Circuit in *Dillingham* v. *United States*, 76 F. (2d) 36 (1935), in which the Court said at page 39 of its opinion:

> "When, as here, defendant brings up a record which shows that he has not had the trial by jury which the Constitution guarantees, if waiver is relied on for affirmance, particularly if the waiver has been given without advice of counsel of his own selection, the record must clearly show that the waiver was formally and legally obtained upon a full explanation and understanding of his rights".

This Court has stated in *Glasser* v. *United States*:

> "To preserve the protection of the Bill of Rights for hard pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights" (p. 70).

Surely, on the record here made by the Government's return, it can be said that the waiver was not formally and legally obtained upon a full explanation and understanding of respondent's rights, and that the trial court did not discharge its duty in that respect with a "sound and advised discretion".

CONCLUSION

It is respectfully submitted that the order of the Court below should be affirmed.

ROBERT G. PAGE,
Attorney for Respondent.

EDWARD D. WYNOT,
of Counsel.

Appendix A

The Sixth Amendment to the Constitution of the United States provides:

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

Section 262 of the Judicial Code (28 U. S. C. §377) provides:

"The Supreme Court and the district courts shall have power to issue writs of scire facias. The Supreme Court, the circuit courts of appeals, and the district courts shall have power to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law."

28 U. S. C. §§ 451, 452 and 463 (a), relating to the power of courts to issue writs of habeas corpus, provide:

Sec. 451. "The Supreme Court and the district courts shall have power to issue writs of habeas corpus."

Sec. 452. "The several justices of the Supreme Court and the several judges of the circuit courts of appeal and of the district courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit, that a district judge has within his district; and the order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

Appendix A.

Sec. 463. (a) "In a proceeding in habeas corpus in a district court, or before a district judge or a circuit judge, the final order shall be subject to review, on appeal, by the circuit court of appeals of the circuit wherein the proceeding is had: *Provided, however,* That there shall be no right of appeal from such order in any habeas corpus proceeding to test the validity of a warrant of removal issued pursuant to the provisions of section 591 of Title 18 or the detention pending removal proceedings. A circuit judge shall have the same power to grant writs of habeas corpus within his circuit that a district judge has within his district. The order of the circuit judge shall be entered in the records of the district court of the district wherein the restraint complained of is had."

Section 215 of the Criminal Code (18 U. S. C., Section 338) provides as follows:

"Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, bank note, paper money, or any obligation or security of the United States, or of any State, Territory, municipality, company, corporation, or person, or anything represented to be or intimated or held out to be such counterfeit or spurious article, or any scheme or artifice to obtain money by or through correspondence, by what is commonly called the "sawdust swindle," or "counterfeit-money fraud," or by dealing or pretending to deal in what is commonly called "green articles," "green coin," "green goods," "bills," "paper goods," "spurious Treasury notes," "United States goods," "green cigars," or any other names or terms intended to be understood as relating to such counterfeit or spurious articles, shall, for the purpose

of executing such scheme or artifice or attempting so to do, place, or cause to be placed, any letter, postal card, package, writing, circular, pamphlet, or advertisement, whether addressed to any person residing within or outside the United States, in any post office, or station thereof, or street or other letter box of the United States, or authorized depository for mail matter, to be sent or delivered by the post office establishment of the United States, or shall take or receive any such therefrom, whether mailed within or without the United States, or shall knowingly cause to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such letter, postal card, package, writing, circular, pamphlet, or advertisement, shall be fined not more than $1,000, or imprisoned not more than five years, or both."

Appendix B

AT A STATED TERM OF THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT, HELD AT THE UNITED STATES COURT HOUSE, FOLEY SQUARE, CITY, COUNTY, AND STATE OF NEW YORK, ON THE 5TH DAY OF JANUARY 1942.

PRESENT: HON. LEARNED HAND,
HON. HARRIE B. CHASE,
HON. CHARLES E. CLARK.

UNITED STATES OF AMERICA, Plaintiff-Appellee, *against* GENE MCCANN, Defendant-Appellant.	ORDER.

Upon the defendant-appellant's notice of motion, dated December 17th 1941, and his "Notice", dated December 2nd 1941, both subjoined to said notice of motion, for an Order granting him the following main and/or alternative relief:

1. Waiving and setting aside, in the case at bar, this Court's requirements under its General Rules 9, 10 and 13 (Sub-division 2) and permitting the defendant-appellant to prosecute his appeal herein, as follows:

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A. Upon a bill of exceptions, record on appeal and an assignment of errors consisting of a resume, in narrative form, of the testimony given, rulings of the Trial Judge, stipulations and concessions made and of the other proceedings had on the trial in the Court below; and

B. upon an assignment of errors, as "to the admission or to the rejection of evidence" or other assigned errors, in narrative form, instead of question and answer or other form, and without quoting verbatim "the full substance of the evidence admitted or rejected", etc; and

C. upon a bill of exceptions and record on appeal containing no findings nor opinions of the Trial Judge, nor of any other proceedings had in this cause not presently found in the Clerk's Trial Minutes or in the files or docket of the Clerk of the Court below or otherwise available to the defendant-appellant; and

D. all pursuant to General Rule 22 of this Court, to the poverty and custody of the defendant-appellant—which makes it impossible for him to pay the some $1,200.00 demanded by the "Southern District Court Reporters", a private agency, for the minutes of the trial in the Court below, and to the provisions of Section 832, Title 28, U. S. Code;

or as alternative relief,

2. Directing that the defendant-appellant be given, for the purpose of copying and perfecting his assignment of errors, bill of exceptions and record on appeal, access to the stenographer's minutes of the trial and proceedings had in this cause in the Court below, at Government expense or otherwise, pursuant to Section 832, Title 28, U. S. Code; and

3. Extending the Term of this Court and of the United States District Court for the Southern District of New York and the time within which the defendant-appellant can perfect, settle and file his bill of exceptions and record on appeal herein in this and the said Court below, to serve and file therein an amended assignment of errors, and for all other purposes, up to and including April 9th 1942; and

4. Granting to the defendant-appellant such other and further relief as to the Court may seem proper and just.

and the said motion having duly come on to be heard before this Court on January 5th 1942,

Now, after hearing Gene McCann, the defendant-appellant pro se, in support of said motion and Richard J. Burke, Assistant United States Attorney for the Southern District of New York, attorney for the United States of America, who consented to the granting of the main relief sought on said motion and opposed only the alternative relief, Numbered 2, sought thereon, it hereby is

ORDERED, that the aforesaid main relief, Numbered 1 and sub-divisions A, B, C and D thereof, sought on the said motion be and the same hereby is, in all respects granted, and it is further

ORDERED, that the aforesaid alternative relief, Numbered 2, sought on the said motion be and the same is, in all respects, denied, and it is further

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ORDERED, that the aforesaid alternative relief, Numbered 3, sought on the said motion be and the same hereby is, in all respects, granted.

L. HAND
UNITED STATES CIRCUIT COURT JUDGE

HARRIE B. CHASE
UNITED STATES CIRCUIT COURT JUDGE

CHARLES E. CLARK
UNITED STATES CIRCUIT COURT JUDGE

Approved as to form:
Mathias F. Correa
United States Attorney,
by Richard J. Burke
Asst. U. S. Atty., of Counsel

A true copy,

D. E. Roberts
Clerk